No. 79-6853
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

LEAH LYNN PARRISH WEBB,

Petitioner,

vs.

JAMES THOMAS WEBB,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF OF AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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PREFATORY STATEMENT

The American Academy of Matrimonial Lawyers is a recognized nonprofit organization, consisting of Family Law and Matrimonial Specialist Lawyers and Judges throughout the United States, whose stated purpose and objective is to "encourage the study, improve the practice, elevate the standards and advance the

cause of matrimonial law, to the end that the welfare of the family and society be preserved."

This Amicus Curiae Brief is being filed in support of the resolution of issues before this Honorable Court that are of far-reaching importance to society at large, and more particularly, to the innocent children who are victims of their parents' separation or divorce.

STATEMENT OF THE CASE

AMICUS CURIAE RELIES UPON PETITIONER'S STATEMENT OF THE CASE AND THE RECORD BEFORE THIS HONORABLE COURT.

THE PROBLEM

At best, the judicial function in child custody disputes is difficult and delicate when the parents after separation remain in the same community or state. When the parents move or live in different states or countries, the problems are

compounded, serious and frustrating. It is self-evident that the movement of our citizens and families has been facilitated by modern transportation facilities, including the automobile and jet plane. Parents and children travel across countries, continents and states in a matter of hours. With increasing frequency in our Courts today, as in the recent past, parents, in their natural desire to obtain custody of their children, or to avoid the acrimony and hostility of a Court fight, and without funds or economic means to engage in litigation, simply frustrate or attempt to defeat the other parent by removing or concealing the child or children of their marriages in a state or community out of the reach of the other, where jurisdictional intervention is sought.

Custody decrees, unlike money or property judgments, are unique in that traditionally they have been modifiable on the basis of subsequent changed circumstances affecting the welfare and best interests of children. Thus, the fundamental

premise that the primary concern of the local Court is the best interest of the child has often conflicted with rules respecting other states' judgments. Assuming that a local Court has jurisdiction based on physical presence of a child, a frequent problem which has arisen continuously is whether to give "full faith and credit" or comity to a sister state's order or judgment. Should the local Court refuse to re-examine the merits of the prior determination, or should it exercise its own discretion in protecting the welfare of the child within its jurisdiction?

Neither the Courts of the individual states, nor this Court have ever articulated principles upon which to base reasonable, workable, jurisdictional rules or guidelines in the best interests of the child. The drafting and passage of the Uniform Child Custody Jurisdiction Act was the ultimate product to assist the states in reaching improved and more reasonable methods of dealing with the jurisdictional disputes.

Justice Jackson in his dissenting opinion of May v. Anderson, 345 U. S. 528, 73 S. Ct. 842 (1953), alluded to the problem in this manner:

> "A state of law such as this, where possession apparently is not merely nine points of the law, but all of them, and selfhelp the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system." (May v. Anderson, supra, p. 541)

Or, as was stated by former Justice Rutledge, in his concurring opinion of Halvey v. Halvey, 330 U. S. 610 (1947), p. 619:

> "The result seems unfortunate in that apparently, it may make possible a continuing round of litigation over custody, perhaps also an abduction between alienated parents. . . . I think that the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of policy . . . but also of formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions." (Emphasis added.)

THE JURISDICTIONAL QUESTION -- FORMER SUPREME COURT CASES

Reference to a landmark case, originating from California, Sampsell v. Superior Court (1948) 32 Cal. 2d 763, 197 P. 2d 739, and prior Supreme Court cases, are helpful in context to direct this Court's attention to the urgent need of this Court to clarify its prior decisions and require full faith and credit to be given to the judicial proceedings of sister states' custody decrees including by implementation and application of the Uniform Child Custody Jurisdiction Act.

In Sampsell, supra, the Supreme Court of California declared that the state where the child is domiciled, the state where the child is physically present, and the state where the defendant is legally present have concurrent authority to make or modify a custody decree because each has an interest in the child's welfare, but one state may defer to the authority of another with

a more substantial interest.

Restatement (Second) Conflict of Laws, Section 117, (1957), adopted this position:

The inherent difficulty with the "Sampsell - Second Restatement Position" was that it did not really assist in reaching enforceable postions. Usually no other state has concurrent jurisdiction when a child is taken to a new state by a parent, because both are domiciled and physically present there. If, for example, the mother leaves with the child and a nondeparting father in a father-domiciled jurisdiction, seeks a home state decree, when he petitions for enforcement, the state where the child is physically present could claim a paramount interest. In such situation, the Court where the child is physically present after giving the prior decree respectful consideration, could make a de novo custody determination.

For example, when divergent parents each commenced separate actions, in separate states, conflicting decrees were the result. In Stout v.

Pate (California) 120 Cal. App. 2d 699, 261 P. 2d 788 (1953), and Pate v. Stout (Georgia) 209 Ga. 786, 75 S. E. 2d 748 (1953), the parties litigated in two states and each decision favored the resident parent. The Supreme Court discreetly denied certiorari (Stout v. Pate (1954) 347 U. S. 968, and Pate v. Stout (1954) 347 U. S. 968).

PRIOR SUPREME COURT CASES

In Halvey v. Halvey (1947) (380 U. S. 610), the Supreme Court affirmed a New York order which had modified a Florida custody award in favor of the mother. When the mother claimed the child by habeas corpus in New York, the New York Court modified the Florida decree by giving the father visitation rights and possession of the child during vacations. The court denied that there was violation of the full faith and credit clause on the narrow ground that Florida law would have permitted this modification and "what Florida could do by modifying the decree, New York may

do." The court refrained from examining the applicability of the full faith and credit clause to custody decrees as such.

In May v. Anderson (1953) (345 U. S. 528), after the mother had declared her intention to keep the children in Ohio where she had temporarily taken them, the father obtained a custody decree in Wisconsin, the state of the family home, and retrieved them. The mother was originally personally served in Ohio, but did not appear in the Wisconsin action. Five years later the mother had possession of the children in Ohio during a visit, and the father petitioned in Ohio for habeas corpus. The Ohio courts gave full faith and credit to the Wisconsin decree and returned the children to the father. The Supreme Court reversed. Speaking through Justice Burton, the Ohio judgment was reversed on the ground that the rendering court, "certainly as against Ohio" had not had the required in personam jurisdiction. "We have before us the question

whether a court of a state where a mother is neither domiciled, resident nor present, may cut off her immediate right to the . . . custody . . . of her minor children without having jurisdiction over her in personam."

Justice Frankfurther rejected an implication that full faith and credit applied to custody decrees of sister states by stating that: "The child's welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time."

In Kovacs v. Brewer (1958) (356 U. S. 604) the court did not help clarify the problems of Halvey or May v. Anderson. In Kovacs, the child had lived in North Carolina with its paternal grandparents for three years, pursuant to a valid New York custody decree. The mother petitioned for modification in New York, where the father and grandfather contested her claim without specific

objection to jurisdiction. The New York court modified the decree so as to give the mother custody. The child, after being kept in North Carolina contrary to the New York decree, was the subject of enforcement proceedings by the mother 14 months later in North Carolina. The North Carolina courts decided that the child should remain with the grandparents. The Supreme Court neither affirmed nor reversed. It simply held on the authority of Halvey, that full faith and credit would not foreclose a North Carolina modification based on a subsequent change in circumstances, as permitted by New York law. It remanded to the state court for clarification whether the modification rested on both prior and subsequent events or solely on the latter. The court reversed for future consideration as to whether full faith and credit would apply to the facts of the case at bar.

Justice Frankfurter in Kovacs, dissented from the implication that the New York decree

was entitled to full faith and credit in the absence of changed circumstances, and asserted that the state where the child is physically present can decide it's custody without being bound by a prior decree.

The Supreme Court also avoided consideration of the effect of the full faith and credit clause in Ford v. Ford (1962) (371 U.S. 187).

In Ford, a mother removed the minor children from the family home in North Carolina to Virginia. The father petitioned for custody in the latter state (Virginia). The parents then reached an agreement by the terms of which custody of the children was given to the father for the school year and to the mother during vacations. On the basis of this private agreement, the Virginia Court dismissed the proceedings. Nine months later, the mother asked for custody in South Carolina, shortly after taking the children there during a summer vacation; the father consented without objection to the

jurisdiction. A lower Court found no change in circumstances but refused to treat the Virginia dismissal as a res judicata order, fixing custody in accordance with the agreement, and gave the children to the mother for the school year and the father during vacations. The State Supreme Court reversed on the ground that the dismissed order was res judicata in Virginia in the absence of changed circumstances, and therefore entitled to full faith and credit in South Carolina.

The United States Supreme Court did not have to decide whether the dismissed order would have been entitled to full faith and credit if made res judicata by Virginia Law. Noting that private agreements are not controlling in custody proceedings, the Supreme Court concluded that Virginia would not treat the order as res judicata because neither the evidence, the agreements, nor the welfare of the child had been considered by the Court. It therefore held that South Carolina could make an independent custody determination.

The result was that the Supreme Court had no difficulty in avoiding a consideration of the effect of full faith and credit on custody decrees and was spared the necessity of examining the due process requirements for initial custody jurisdiction by the father's acquiescence in the jurisdiction in the South Carolina Court.

THE UNIFORM CHILD CUSTODY JURISDICTION ACT

The inevitable result of the conflicting and confusing decisions of both the Supreme Court and State Court decisions left lawyers and their clients in a constant state of uncertainty and dilemma. Neither the parents nor their lawyers could have the status of the children of separated or divorced parents determined with reasonable certainty. The children were the subject of an incessant tug of war, or "seize and run" actions. Therefore, initiative by other means was crucial.

The Uniform Child Custody Jurisdiction Act was conceived and adopted by the National Conference of Commissioners on Uniform State Laws in July, 1968, and approved by the American Bar Association in August, 1968.[1/]

The history of the Uniform Child Custody Jurisdiction Act and its promulgations strongly urged recognition and articulation of certain jurisdictional goals, which included:

1. A fair place of trial for the litigants.

2. A custody determination by the Court most likely to decide correctly, i.e. by the Court having maximum access to the relevant evidence.

1/ See Bodenheimer, The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws, 22 Vanderbilt Law Review 2107 (1969) and Bodenheimer, The Uniform Child Custody Jurisdiction Act, 3 Fam. L.Q. 304 (1969). See also Ratner, Legislative Resolution of the Interstate Child Custody Problem: A reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183 (1965); Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795 (1964) and Comment, Legislative Opportunity for Oregon: The Uniform Child Custody Jurisdiction Act, 7 Williamette L. J. 498 (1971).

3. The discouraging of abduction, removal, retention or concealment of a child.

4. The avoidance of jurisdictional competition and conflicts with Courts of other states.

5. The avoidance or relitigation of custody decisions of other states.

6. The promotion of cooperation with the Courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interests of the child.

As a recent inquiry, 46 states have adopted the Uniform Act.[2/]

A principal purpose of the Uniform Act was to reduce the discretionary powers of courts to assume jurisdiction, if there is only a minimal contact between the child and the state. This is accomplished by the use of a key basis for jurisdiction. Under the Act, a court has jurisdiction under the Act, if (a) it is located in the "home

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2/ Family Advocate, Vol. 3, No. 2 (1980), page 6.

state" of the child,[3/] or (b) has become the home state or had been the home state within six months prior to the action and the child is now absent but a parent remains, or (c) it is in the best interests of the child that the court assume jurisdiction because the child and at least one contestant have significant contact with the state and there is substantial evidence relating to the child's future prospects available in the state. The Section further provides that mere presence of the child will not vest jurisdiction, excepting, of course, the state's power to exercise jurisdiction as parens patriae to provide for the needs of neglected or abandoned children within the state.

There was reason to adopt the "home state" provision in the act. An established home forum is probably consistent with the reasonable

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3/ "Home state" is defined in Sec. 3(5) of the Act as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or person acting as a parent for at least six consecutive months."

expectations of each parent and not inconvenient for the nonresident. Often that parent has previously lived there, and, in any event, has had continuing significant contact at the place where his or her child last lived for a substantial period. The state where a child is physically present may always remove the child from the control of a person who is there abusing it, but that state is not by reason of such general authority necessarily the best venue for litigating a custody dispute between the resident and nonresident parent of any child there present.

The theory of the Uniform Act was in part based upon acknowledged facts of life. Most American children are probably integrated into an American community after living there six months. This period of residence provides a reasonable criterion for identifying the established or home state. A difficult factual determination is thereby avoided, delay in the assertion of custody claims are discouraged, and the area of

jurisdictional uncertainty is thereby reduced.[4/]

There is sound reason for the concept. The interstate custody dispute has created acute problems for children despite the psychiatric imperative that demands the optimum of stability in a child's environment.[5/] The last established home acquired after a custody decree is usually the most appropriate forum for litigating modification as long as the child or parent is living there. That forum usually has the greatest access to evidence of a subsequent change in circumstances, and is probably consistent with the reasonable expectation of both parents. In the concept of the Act, if the noncustodial parent removes the child

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4/ See Leonard G. Ratner, "Legislative Resolutions of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act," 38 So. Cal. Law Review II, 1965 at page 186.

5/ See Watson, "Psychiatry for Lawyers," and see generally Watson, "The Children of Armageddon: Problems of Custody Following Divorce," 21 Syracuse Law Review 55, 1970.

to another state, jurisdiction should not shift unless the custodial parent takes no action until the child acquires a newly established home, or when the noncustodial parent and child cannot be located in time to prevent the creation of such a home. Under these circumstances, the second state should return the child to the home of the custodial parent without considering the noncustodial's request for modification if the prevailing parent was diligent in seeking enforcement and the prior home state remains a fair venue for litigating the modification issue.

THE CASE AT BAR

The resolution of the issues presented by the case at bar should not be left without appropriate intervention and clarification by this court of the rule of jurisdictional law applicable to child custody disputes. We are concerned with the manner in which the Georgia Supreme Court bypassed the mother's argument that the pendency

of the Florida proceedings pre-empted Georgia jurisdiction. The Georgia Supreme Court, in its Decision, observed the following:

> "(2) The mother also argues that the pendency of the Florida action pre-empted Georgia jurisdiction. The action was pending in Florida at the time the father filed his suit, and while the father did not properly inform the Georgia court of this fact, this information was fully supplied to the Georgia court by the mother in her motion to dismiss. This fact placed a duty upon the trial court to confer with the Florida court with a view toward determining the appropriate forum. Code Ann. § 74-507. This was not done. Correspondingly, the Florida court, having notice in the mother's pleadings that an action might be pending in Georgia, was under a duty to confer with the Georgia court. There is nothing in the record before this court to indicate any effort on the part of the Florida court to fulfill this duty prior to entering its final judgment.
>
> Among the primary purposes of the Uniform Child Custody Jurisdiction Act is to avoid overlapping adjudication and to prevent judgment races. In this case, neither state made a contribution toward that goal.
>
> The Georgia court exercised its jurisdiction with knowledge of the case in Florida. The Florida court entered its final order with notice that an action

might be pending in Georgia. Neither court consulted the other."
(Emphasis added.)

Thus, we have two state courts, each under a duty to confer with the other to determine the appropriate forum, but failed or refused to do so. The Georgia Court acted unilaterally on the premise that the situation presented "an emergency situation."

ISSUE

The critical issue before this Court is:

Did the Georgia Court commit prejudicial error in its failure to accord full faith and credit and res judicata effect to the Florida Decree of April 18, 1979, which vested custody of the minor child in the mother?

In deciding the foregoing issue, the Uniform Act (Georgia Code, Sec. 74-507) provides:

> "A court of this state shall not exercise its jurisdiction under this title if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state

> exercising jurisdiction substantially in conformity with this title, unless the proceeding is stayed by the court of the other because this state is a more appropriate forum or for other reasons."

The Act further provides (Georgia Code, Section 74-507c):

> "If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceedings and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in a more appropriate forum and that information is exchanged in accordance with the Sections 74-520 and 74-523."

The Georgia trial court did not stay proceedings and communicate with the Florida court to the end that the custody issue might be litigated in the most appropriate forum.

ARGUMENT

A CUSTODY DECREE OF A COURT WHOSE JURISDICTION IS SUPPORTED BY THE ESTABLISHED "HOME STATE PRINCIPLE, AS EMPHASIZED BY THE UNIFORM ACT, SHOULD RECEIVE THE PROTECTION OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

The full faith and credit clause of the United States Constitution has long compelled interstate recognition of a divorce decree by a plaintiff's domiciliary state.[6/] A finding of domicile in other jurisdictions is binding in the forum upon a defendant who participated in the proceedings.[7/]

The Uniform Act provides for res judicata and binding effect when a custody decree is involved, in the following manner:

6/ See Williams v. North Carolina (1942) 317 U. S. 287.

7/ Coe v. Coe (1948) 334 U. S. 378; Sherrer v. Sherrer (1948) 334 U. S. 343.

> "A custody decree rendered by a court of this state which had jurisdiction under Section , binds all parties who have been served in this sate or notified in accordance with or who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard. As to these parties, the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law."
> (Florida Civil Practice & Procedure, § 61-326; see also Georgia Code, Section 74-513.)

In the case at bar, father was served in the Florida proceedings and was given opportunity to be heard. Notwithstanding a prior Florida custody decree in the "home state" of the child, the Georgia Court acted without considering the res judicata-binding nature of the Florida decree. We submit that the Georgia Court committed error.

Amicus Curiae submits that the Constitutional policies of res judicata and interstate respect demand full faith and credit protection in the adjustment of parent-child relationships,

as well as in the dissultion of the marriage relationship itself.

To discourage abduction, or concealment of children, to limit the waste in individuals' social resources involved in relitigation, to provide greater psychological stability for the child, to protect the reasonable expectations of parents, and to promote federal cohesion, each state should accept and enforce the valid custody determinations of every other state, without readjudicating the previously decided issues.

Although a Court with jurisdiction to modify a decree necessarily has broad discretion, application of the full faith and credit-res judicata principles in such proceedings gives the prevailing parent the benefit of previous findings, narrows the area of litigation, and imposes upon the petitioner a burden of proving a change in circumstances sufficient to overturn the prior adjudication.

CONCLUSION

The Uniform Child Custody Jurisdiction Act has endeavored to develop workable rules for the allocation of child custody jurisdiction. The Supreme Court should now articulate the values to be implemented consistent with such Act. The values, principles, and rules formulated by the Supreme Court in defining state judicial authority and the extraterritorial effect of judgments must be consistent with Constitutional Requirements, and we ask that this Court assert such clarification.

Meaning can only attach to the phrases "due process of law" and "full faith and credit" by identifying the values this Court considers implicit in the language of the Uniform Child Custody Jurisdiction Act. The broad policies of fundamental fairness, national unity and cooperation emphasized by the provisions of the Uniform Act, can then become functional guides for the allocation of jurisdiction. When it is

translated in terms of the welfare of the children affected by the litigation, the convenience of venue, the accessibility of evidence, the consequences of repeated litigation, the reasonable expectation of the litigants, and the importance of interstate cooperation and respect, the results are significant. Only in this manner will the foresight and emphasis of former Justice Rutledge of this Court, as set forth in his concurring Opinion in Halvey, supra, be given meaning:

> ". . . the controlling consideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy . . . but also for formulating federal policies of full faith and credit as well as jurisdiction and due process in relation to such dispositions . . ."

Respectfully submitted,

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